STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to the Court of Appeals
Appeal From Anderson County
The Honorable J.C. Nicholson, Jr., Circuit Court Judge
Appellate Case No. 2012-213405

The State, Petitioner,

v.

Raheem D. King, Respondent.

Opinion No. 5313 (S.C. Ct. App. filed April 22, 2015)

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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ATTORNEYS FOR PETITIONER

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CERTIFICATION OF COUNSEL

Counsel for Petitioner hereby certifies a Petition for Rehearing was filed in the South Carolina Court of Appeals on May 12, 2015. The Petition for Rehearing was denied by Order filed June 5, 2015.

STATEMENT OF QUESTIONS PRESENTED

I. Did the Court of Appeals err in finding the circuit court erroneously charged the jury attempted murder was a general intent crime, and the charge as given was not harmless error?

II. Did the Court of Appeals err in finding a police officer's testimony regarding what she learned during a neighborhood canvass after the shooting was inadmissible hearsay, and the admission of her testimony was not harmless error?

STATEMENT OF THE CASE

On March 8, 2011, the Charleston County Grand Jury indicted Respondent Raheem D. King on one count of attempted murder, one count of armed robbery, and one count of possession of a firearm during the commission of a violent crime. The charges arose from an incident on November 26, 2010, during which Respondent lured a cab to an address in Charleston County, and then robbed and shot at the cabdriver, Dario Brown ("Mr. Brown"). The case was called for trial on November 5, 2012, before the Honorable J.C. Nicholson, Jr., Circuit Court Judge.

Prior to trial, Respondent moved to suppress records from Cricket Wireless regarding a particular cell phone number associated with the case, asserting the affidavits submitted in support of the search warrants for the records were insufficient, and contained conclusory and misleading statements. The State argued the supporting affidavits contained more than sufficient information establishing probable cause to obtain the records. After reviewing the affidavits and search warrants, the circuit court denied the motion to suppress. (Record on Appeal [R.], pp. 2-12; 297).

Devin Parker ("Parker"), a Yellow Cab Company telephone operator, testified a call came in at 4:06 a.m. on November 26, 2010, requesting a cab at 1808 Carlton Street, and he dispatched Mr. Brown to that address at 4:11 a.m. Parker stated the caller identified himself as Kevin, and the caller ID showed the call came from the number 642-4849. (R., pp. 44-51, 313).

Mr. Brown testified he arrived at 1808 Carlton within one or two minutes. He was familiar with Carlton Street because he lived there for several years, and his aunt lived on the street. When he arrived at 1808 Carlton, Mr. Brown saw a man walking out

of the yard across the street at 1809 Carlton Street, which he knew was abandoned. (R., pp. 53-55, 58-61).

The man entered the cab's passenger side backseat. When he opened the cab door, the dome light came on, and Mr. Brown was able to see the man's facial features and attire. Mr. Brown asked the man why he came out of the yard of an abandoned residence, and the man replied it was his yard. (R., pp. 60-62).

After the man shut the door, Mr. Brown made a U-turn at the dead end of the road. He heard a pistol cocking, looked back and saw the man raise a gun to his head. The man demanded money, and Mr. Brown gave him the "give away money," or "dummy money," which was a stack of one-dollar bills drivers keep under the seat or between their legs to give to robbers, but the man demanded more money. Mr. Brown testified he was basically begging for his life at this point, and was so scared his legs would not move. (R., pp. 62-65).

Mr. Brown tried to use his forearm to move the gun away from his head three times, pleading with the man not to shoot him. The third time, the man shot Mr. Brown in the elbow and the bullet passed through his forearm. Mr. Brown described the gun as a .25 caliber automatic that ejects shells when fired. (R., pp. 65-68, 95-97).

After the man shot him, Mr. Brown got out of the cab and ran toward the dead-end of the street, screaming for help. With the man chasing him, Mr. Brown flipped headfirst over a three to four foot chain-link fence, and landed on his back, fracturing a vertebrae. Mr. Brown testified the man fired a shot during the pursuit, and after he flipped over the fence, the man pointed the gun over it and fired another shot. Mr. Brown was able to maneuver himself behind a burgundy van in the yard, approximately five to

ten feet away from the fence, and the man fired six or seven more shots. The man yelled he would stop shooting if Mr. Brown gave him the money. (R., pp. 68-72, 78-79,101, 104).

Mr. Brown used his cell phone to call the police, and the man fled the scene. Mr. Brown testified he clearly saw the man, and described him as having "brown skin, kind of heavy set with a round face, scruffy beard and an afro . . ." wearing a hoodie over his head, and he told law enforcement there was no doubt in his mind he could identify the man in a photo lineup. When law enforcement subsequently showed him a photo lineup of six individuals, he was able to identify Respondent as the shooter with "100 percent" certainty. (R., pp. 73-74, 77-78, 86, 89, 104).

Officer Jennifer Butler ("Officer Butler"), with the North Charleston Police Department, was the first responding officer at the scene, arriving at approximately 4:21 a.m. She saw a cab had run into a pole on the side of the road, but no one was inside. Mr. Brown flagged her down from across the dead-end of the street, and he was very distraught, scared, and appeared to be in shock. He reported he had been dispatched to 1808 Carlton, and the man he picked up there robbed him and shot him in the forearm. (R., pp. 110-114, 120).

The responding officers did not know where the shooter went, and a canine unit came to try and track him if possible. Officer Butler and another officer canvassed houses in the area to determine if anyone saw or heard anything relating to the crime. The State asked Officer Butler if she was able to make contact with anyone in the area, and she responded they were able to speak to two people, who "were able to confirm . . ."

At that point, the circuit court sustained Respondent's hearsay objection. (R., pp. 114-115).

The State then asked Office Butler what she learned during the investigation she conducted that night. The circuit court overruled Respondent's second hearsay objection, stating Officer Butler could testify to what she learned in the investigation, Officer Butler testified she learned approximately three or four shots were fired that night. (R., p. 115).

Shawn Mitchell ("Mitchell"), a legal compliance analyst at New Star ("New Star"), a records production company, testified New Star maintains the phone records, including subscriber information and call logs, for Cricket Wireless subscribers. In response to a subpoena, Mitchell pulled the records for 843-642-4849, which was the number from the call requesting the cab pickup at 1808 Carlton. The records revealed a Cricket Wireless subscriber named "Kevin King," with the address 3440 Elliot Street, Charleston, South Carolina 29405-7332, and a 1991 date of birth (R., pp.142-146).

Mary Wearing ("Wearing"), a custodian of driver's records at the South Carolina Department of Motor Vehicles ("SCDMV"), testified Respondent's most recent address on his driver's license was 3440-B Osceola Street, North Charleston, South Carolina 29405. Also, Respondent's driver's license reflected a 1991 birthdate. (R., p.162, 165-166).

Detective Patricia Jourdan ("Detective Jourdan") testified she showed Mr. Brown a photo lineup on November 29, 2010. There were photos of six men in the lineup, but Mr. Brown did not identify any of them as the shooter. (R., pp. 168-174). Detective Mark Evans ("Detective Evans") testified the only information investigators had initially was the cell phone number from the call to the cab company. They learned it was a

Cricket Wireless number, which was registered to Kevin King, 3440 Elliott Street, with a 29405 zip code and a 1991 date of birth. They determined the street address given to Cricket Wireless did not exist, and Elliott Street was in the 29401 zip code area. Using driver's license records, they then tried matching up people in the area with the last name King and the 1991 birthday. They found Rakeem King (Respondent) with the same 1991 birthday given to Cricket Wireless, and an address of 3440 Osceola Street with a 29405 zip code. (R., pp. 192-195).

As a result of the information obtained from this investigation, Detective Evans recommended a second photo lineup with Respondent's photo. On December 3, 2010, Mr. Brown viewed the second photo lineup with six photos, including Respondent. Detective Walter Boone testified Mr. Brown immediately identified the third photo (Respondent), and was 100% sure Respondent was the man who robbed and shot him. (R, pp. 176-184, 195-197).

Respondent moved to suppress a compact disk containing recordings of telephone calls Respondent made while in custody at the Detention Center (the "CD"), arguing relevancy and unfair prejudice due to the language used and difficulty understanding what was said. The State argued the CD was highly relevant because it directly connected Respondent to the cell phone used to lure the cab to the scene. The circuit court denied the motion to suppress, but offered to redact portions Respondent believed were unduly prejudicial. Respondent then withdrew his request to redact portions of the CD. (R., pp. 209-216).

Kevia Heyward ("Heyward"), Security and Administrative Supervisor at the Detention Center, testified the Detention Center has a recording system to record all

inmate telephone calls. When booked into the Detention Center, each inmate receives a unique pin number for the system that must be used when they attempt to make a phone call, and the system automatically records all completed calls, except those made to the inmate's attorney, into compact disk storage form. The inmate is advised all calls are recorded, and the recordings are maintained in the Detention Center's ordinary course of business. The Detention Center Call Log indicated Respondent called the cell phone at issue sixty-three times in one month. The cell phone was in the possession of an unknown third party, but Respondent and the third party made statements during the calls clearly indicating the cell phone belonged to Respondent. (R., pp. 218-224), 314).[1]

The circuit court charged the jury on the elements of attempted murder, the lesser included offenses of assault and battery of a high and aggravated nature ("ABHAN") and first degree assault and battery, armed robbery, attempted armed robbery, and possession of a weapon during commission of a violent crime. (R., pp. 249-266). Respondent objected to the attempted murder jury charge on the ground attempted murder is a specific intent crime rather than a general intent crime. He also objected to the inference of malice from use of a deadly weapon charge. (R., pp. 268-271).

The jury convicted Respondent of attempted murder, armed robbery and possession of a weapon during a crime of violence. The circuit court sentenced Respondent to concurrent prison terms of thirty years on the armed robbery conviction and ten years on the attempted murder conviction, with a consecutive five year term on the possession conviction. (R., pp. 267, 278-279). This appeal followed.

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[1]State's Exhibit 33 (CD) was transported to the Court of Appeals for consideration.

By published opinion filed April 22, 2015, the South Carolina Court of Appeals affirmed in part, reversed in part, and remanded the case to the circuit court for a new trial on the attempted murder charge. The Court affirmed Respondent's convictions for armed robbery and possession of a firearm during commission of a violent crime, but reversed his attempted murder conviction, finding the circuit court erred in charging the jury attempted murder is a general intent crime. The Court also found Officer Butler's testimony about what she learned during the neighborhood canvass was inadmissible hearsay, and the error in admitting it was not harmless. (Appendix, pp. 1-14).

The State petitioned for rehearing, which the Court denied by Order filed June 5, 2015. (Appendix, pp. 15-27). The State now serves and files its Petition for Writ of Certiorari to the Court of Appeals, and asks this Court to review the Court of Appeals' findings regarding the attempted murder jury charge and Officer Butler's testimony.

ARGUMENT

I. The Court of Appeals erred in finding the circuit court erroneously charged the jury attempted murder was a general intent crime, and the charge as given was not harmless error.

Premised primarily on dicta from State v. Sutton, 340 S.C. 393, 532 S.E.2d 283, 285 (2000), stating a **common law** attempted murder charge "would require the specific intent to kill," the Court of Appeals concluded the Legislature "intended to require the State to prove the specific intent to kill as an element of attempted murder" under S.C. Code Ann. §16-3-29 (Supp. 2014). As further support for its conclusion, the Court cited to common law "attempt" cases, as well as cases holding the Legislature is presumed to be aware of the courts' interpretation of its statutes. The Court of Appeals' reliance on Sutton, "attempt" cases, and statutory interpretation cases was misplaced, and ignored relevant case law and history leading to enactment of the attempted murder statute in 2010.

A. Attempted Murder Statute/Legislative Intent

Murder is "the killing of any person with malice aforethought, either express or implied." S.C. Code §16-3-10 (2003). A specific intent to kill is not required for a murder conviction. State v. Foust, 325 S.C. 12, 479 S.E.2d 50, 51 (1996).

The common law offense of assault and battery with intent to kill ("ABWIK") was defined as an unlawful act of violence to the person of another, with either express or implied malice aforethought, and a specific intent to kill was **not** required. *Id.*.[2] For

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[2]In 1962, the Legislature made the common law ABWIK offense a felony punishable by up to twenty years incarceration. S.C. Code Ann. 16-3-620 (2003), *repealed by* 2010 Act No. 273, §7.A, effective June 2, 2010 (abolishing ABWIK, ABIK, ABHAN and other common law offenses). Therefore, the requisite common law general intent requirement still applied.

purposes of murder and ABWIK, malice is the wrongful intent to injure with a wicked or depraved spirit intent on doing wrong, and doing the act intentionally, without just cause or excuse. Tate v. State, 351 S.C. 418, 570 S.E.2d 522, 527 (2002).

In Sutton, this Court first addressed the issue of whether attempted murder was an offense in South Carolina. Declining to recognize the common law attempted murder offense, which required an specific intent to kill, as an offense separate from ABWIK, the Court specifically found the common law ABWIK and ABIK offenses "adequately cover the conduct which attempted murder would include." 532 S.E.2d at 285-286. In short, unlike **common law** attempted murder, common law ABWIK did **not** require a specific intent to kill.

In 2010, as part of an omnibus crime bill, the South Carolina Legislature enacted the attempted murder statute, and expressly abolished the common law offense of ABWIK. Section 16-3-29 provides "[a] person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder."

In concluding the Legislature did not intend §16-3-29 to codify the common law ABWIK offense, which did not require a specific intent to kill, the Court of Appeals cited to statutory construction cases indicating the Legislature is presumed to know about judicial decisions interpreting its statutes. Significantly, in reaching this conclusion, the Court ignored multiple cases holding common law ABWIK, like murder, was a general intent rather than a specific intent offense, relying instead on the dicta in Sutton as case law the

Legislature was presumed to know when it passed the attempted murder statute.[3] *See, e.g.*, State v. Dennis, 402 S.C. 629, 742 S.E.2d 21, 27 (Ct. App. 2013) (ABWIK requires a general intent to kill, and South Carolina courts have recognized "the element that distinguishes ABWIK from ABHAN is not malice, but an intent to kill.")

Given the fact the attempted murder statute uses language virtually identical to common law ABWIK, and the Legislature is presumed to be aware of the ABWIK case law regarding the intent required for ABWIK, it is clear the Legislature intended the attempted murder statute to incorporate the same intent required for ABWIK.[4] *See* William S. McAninch, W. Gaston Fairey, Lesley M. Coggiola, The Criminal Law of South Carolina 253-256 (6th ed. 2013) (common law ABWIK did not require specific intent to kill; attempted murder statute removed issues regarding the intent required by adopting definition mirroring the definition of murder, and limited the offense to actions that would be murder if the victim died). As interpreted by the Court of Appeals, the attempted murder statute imposes a more culpable intent requirement than required for murder itself.

If a defendant grievously injures someone with malice aforethought, and the victim dies, the defendant can be convicted of murder and sentenced to prison for thirty years to life, **without** any proof the defendant actually intended to kill the victim. Under

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[3]Notably, when the Legislature enacted §16-3-29 in 2010, there were no cases interpreting previous statutes regarding attempted murder because they did not exist. Thus, the Legislature's only point of reference when writing §16-3-29 and abolishing ABWIK was the case law interpreting "malice aforethought," and holding ABWIK, which also required "malice aforethought," was a general intent crime.

[4]Contrary to the Court of Appeals' rationale, the Legislature's use of the term "with intent to kill" in the statute does not obviate an intent to codify the common law ABWIK offense with the same general intent requirement. On its face, common law ABWIK included "with intent to kill," but courts consistently held proof of a specific intent to kill was not required.

the Court of Appeals' interpretation of §16-3-29, however, if the same defendant acts with the **same** malice aforethought against the same victim, and inflicts the same grievous injuries, but the victim survives, the defendant cannot be convicted of attempted murder unless the State proves the defendant acted with the specific intent to kill the victim. That is an absurd result the Legislature could not have intended. *See* State v. Sweat, 386 S.C. 339, 688 S.E.2d 569, 575 (2010) ("Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention.").

In support of its analysis, the Court of Appeals noted the Legislature abolished ABWIK with no reference to codifying it as attempted murder, and legislatively changing all statutory references to ABWIK to attempted murder was merely to avoid any confusion regarding the effect of the "new crime of attempted murder." This overlooks the fact the Legislature also abolished the common law offenses of assault and battery of a high and aggravated nature (ABHAN), simple assault and battery, assault of a high and aggravated nature, aggravated assault, and simple assault, but did not reference the "new" crimes of ABHAN, and first degree, second degree and third degree assault and battery created by S.C. Code Ann. §16-3-600 (Supp. 2014), which incorporated the elements of those common law offenses.

If the Legislature intended attempted murder to be a specific intent crime because common law attempt requires a specific intent to commit the underlying offense, the attempted murder statute is essentially superfluous. The 2010 Omnibus Crime Act did not repeal S.C. Code Ann. §16-1-80 (2003), which provides that a person committing the common law offense of attempt must be punished as for the principal offense, and all the

case law regarding common law attempt prior to 2010 required the specific intent to commit the underlying offense. Thus, the Legislature could have simply abolished ABWIK, and amended S.C. Code Ann. §16-3-20 (2003) (punishment for murder) to include the punishment for attempted (based on §16-1-80) murder (up to thirty years in prison). The fact the Legislature enacted the attempted murder statute indicates it did not intend the common law attempt specific intent requirement to apply to attempted murder.[5]

The Court of Appeals' conclusion also overlooks the fact the Legislature was not bound by the dicta in Sutton regarding common law attempted murder when enacting the attempted murder statute. Rather, it was free to use the common law ABWIK elements in defining attempted murder.

In this case, the circuit court charged the jury:

> **An attempt includes a specific intent to do a particular criminal act along with that act falling short of the act intended.** The State must show more than mere preparation and intent. It must be some overt act committed and the effort to commit the crime. **Intent means intending the results which actually occurred not accidentally or involuntarily.** Intent may be shown by acts and conduct of the defendant in other circumstances from which you may naturally and reasonably infer intent. **Attempted murder: a person with the intent to kill attempts to kill another person with [m]alice [a]forethought either expressed or implied commits the offense of attempted murder.** Malice is a hatred, ill will, or hostility towards another person is (sic) the intentional doing of a wrongful act without just cause or excuse with an intent to inflict an injury under circumstances that the law will infer as evil intent.

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[5]Notably, the Legislature did not enact any other specific "attempt" crimes in 2010, and no other such crimes exist in the South Carolina criminal code, which is further indication the Legislature intended attempted murder to be different from common law attempt.

(R., pp. 258-259) (emphasis added).[6] The court subsequently stated "a specific intent to kill is not an element of [a]ttempted murder, but it must be a general intent to commit serious bodily harm," and correctly defined intent as "intending the results which actually occur, not accidentally or involuntarily." (R., pp. 260-261).

Respondent objected to the charge that attempted murder is a general intent crime, and requested the jury be charged it is a specific intent crime. Respondent acknowledged the attempted murder statute included "malice," but suggested the jury be charged attempted murder requires intent to kill, without a definition of malice.[7] The circuit court reviewed the attempted murder statute language, and found the Legislature intended the same general intent requirement for attempted murder as for murder. The court logically reasoned that making attempted murder a specific intent crime would create a higher intent requirement for attempted murder than murder, which could not have been the legislative intent when enacting the attempted murder statute. (R., pp. 268-270).

The circuit court's jury charge as a whole was substantially correct, adequately covered the applicable law, and included the statutory elements of attempted murder, including the "intent to kill" and "malice aforethought" language. Accordingly, the State

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[6]While the court also referenced the "attempt" charge in connection with attempted armed robbery, the attempted murder charge was immediately after the attempt charge. Further, the charge given is almost verbatim the attempted murder charge suggested in the General Session jury charges found on the South Carolina Judicial Department website.
See http://www.sccourts.org/whatsnew/displayWhatsNew.cfm?indexId=896, at pages 83-86.

[7]Such a charge would have been an incorrect statement of the law because malice is an element of attempted murder under §16-3-29, and the definition of malice is part of the standard jury charge used in murder and ABWIK. *See* State v. Fennell, 340 S.C. 266, 531 S.E.2d 512, 517, n. 2 (2000) (definition of malice for murder and ABWIK cases); State v. Kinard, 373 S.C. 500, 646 S.E.2d 168, 170 (Ct. App. 2007) (same).

submits the Court of Appeals erroneously held the circuit court erred in charging attempted murder under §16-3-29 is a general intent offense, and reversing Respondent's attempted murder conviction. The Court of Appeals' holding is contrary to the legislative intent of the attempted murder statute, and leads to a ludicrous result the Legislature could not have intended.

B. Harmless Error

Even if §16-3-29 did create a specific intent offense and the circuit court's general intent charge was erroneous, the Court of Appeals failed to do a harmless error analysis. When the jury charges are viewed in their entirety, the circuit court's general intent charge was harmless beyond a reasonable doubt.

Erroneous jury instructions are subject to a harmless error analysis. State v. Logan, 405 S.C. 83, 747 S.E.2d 444, n. 8 (2013) (*citing* State v. Belcher, 385 S.C. 597, 685 S.E.2d 802, 809 [2009]). "Jury instructions should be considered as a whole, and if as a whole, they are free from error, any isolated portions which may be misleading do not constitute reversible error." *Id.* (*citing* State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248, 251 [2000]).

The jury charges in this case included common law attempt as a specific intent to commit the underlying offense, and the statutory elements of attempted murder, including "intent to kill" and "malice aforethought." Regardless of the circuit court's subsequent charge that attempted murder did not require a specific intent to kill, but a general intent to commit serious bodily harm, the jury was clearly instructed it had to find Respondent acted with "malice aforethought."

In Kinard, the Court of Appeals found there is no discernible difference between malice aforethought and intent to kill, and "[s]ince the definition of malice aforethought [in ABWIK cases] encompasses general intent to kill, [it is] difficult to reconcile a manner in which one could find malice aforethought and yet not find general intent to kill." 646 S.E.2d at 170. Thus, if the jury found Respondent acted with malice aforethought as defined by the circuit court, it had to find he acted with the intent to kill required by §16-3-29. Therefore, error in charging attempted murder as a general intent crime, if any, was harmless, and the Court of Appeals opinion on this issue should be reversed.

II. The Court of Appeals erred in finding a police officer's testimony regarding what she learned during a neighborhood canvass after the shooting was inadmissible hearsay, and the admission of her testimony was not harmless error.

A. Hearsay

Citing State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), and State v. Weaver, 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004), *aff'd as modified*, 374 S.C. 313, 649 S.E.2d 479 (2007), the Court of Appeals also found error in admitting the Officer Butler's testimony regarding what she learned during a neighborhood canvass immediately after the shooting. The Court ignored the evidence indicating there was a real possibility an active shooter was still in the area, and learning what neighbors heard and/or saw was vital as officers tried to locate him and process the crime scene. In addition to Mr. Brown's account of multiple shots fired, the information provided further reasons to look for additional shell casings in the area.

Contrary to the Court of Appeals' analysis, Kromah and Weaver support admission of Officer Butler's limited testimony. In Kromah, an investigator testified about the investigation and numerous people he interviewed, including the minor victim, and did not directly relate any statements made by the people he interviewed, but stated he made the decision to arrest the defendant based on all the information he received. The Supreme Court held his testimony was properly admitted, even if it was a form of indirect hearsay, because it was part of what the investigator considered in reaching his decision, and he did not repeat what the victim (or any other person he interviewed) said. 737 S.E.2d at 498 (officer's testimony that all the evidence gathered at the scene, including interviews with witnesses, led to the defendant was not inadmissible hearsay;

officer never repeated statements made to him by individuals at the crime scene, or testified to any specific statements identifying the defendant).

In Weaver, the investigator testified on re-direct, over objection, that all the witnesses he interviewed implicated the defendant as the sole gunman in the murder. The Court of Appeals affirmed, finding the testimony was not inadmissible hearsay because it did not recite any statements made to the investigator, it was offered to explain why the investigator did not do gunshot residue tests on others at the scene, and the investigator did not testify about any specific statements identifying the defendant. 602 S.E.2d at 792-793.

Similar to the police officers in Kromah and Weaver, Officer Butler merely testified about what her part of the investigation at the crime scene revealed.[8] She did not repeat any specific statements made by the people she interviewed, and contrary to the investigator's testimony in Weaver, nothing she related about what she learned during the canvass identified Respondent in any way. Further, the information she received provided another reason for investigators to search the area for additional shell casings.

B. Harmless Error

The Court of Appeals found the circuit court's error in admitting Officer Butler's testimony was not harmless, speculating that but for her testimony, the jury "could" have found Respondent fired only one shot, which was fired during a struggle with no intent to kill Mr. Brown. The Court further speculated "it is more difficult to imagine, however that [Respondent] could have chased Brown down Carlton Street while shooting at him

[8]Officer Butler was not the lead investigator on the case, but she was the first officer on the scene, and gave the information she gathered during the canvass to the officers conducting the crime scene investigation.

unless he specifically intended to kill Brown," which made Officer Butler's testimony regarding the number of shots fired "critical to the State's ability to prove [Respondent] continued to shoot at Brown after they exited the cab." (Appendix, pp. 11-12). The Court of Appeals' analysis overlooks the totality of the evidence presented, and assumes the only way the jury could find attempted murder was to believe multiple shots were fired.

The Court of Appeals opined the fact the gun went off when Mr. Brown pushed the gun away supports an inference Respondent did not intend to kill Mr. Brown. This overlooks the undisputed evidence Respondent held a loaded, cocked handgun to the back of Mr. Brown's head, and brought it back to his head the first two times Mr. Brown pushed it away, from which the jury could easily find an intent to kill (specific or general), even if it believed Respondent only fired one shot. It also overlooks the undisputed fact Respondent lured Mr. Brown to an abandoned home in the middle of the night, and immediately pulled the gun on Mr. Brown when he got into the cab.

Significantly, the jury's question during deliberations belies the Court of Appeals' focus on the number of shots fired. The jury asked whether pointing a gun at someone's head and not pulling the trigger would be attempted murder. This question indicates the jury was focused on the one shot fired inside the cab, and what led up to it, **not** the number of shots fired, and establishes the harmless nature of Officer Butler's testimony.

Further, the Court of Appeals overlooked the fact Officer Butler's testimony regarding the number of shots fired was cumulative to Mr. Brown's testimony Respondent fired six or seven shots that night. (R., pp. 69-70). *See* State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645, 662 (2013) ("'Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless.'") (*quoting* State v.

Jennings, 394 S.C. 473, 716 S.E.2d 91, 93–94 [2011]). In addition, it was clear Officer Butler was not present during the shooting, and her information about the number of shots fired was based solely on information for neighbors, and Respondent had ample opportunity to cross-examine her on that issue. *See* State v. Price, 368 S.C. 494, 629 S.E.2d 363, 366 (2006) (admission of hearsay testimony from investigator regarding defendant's association with a gang was harmless because it was cumulative to other evidence in the record, and defendant impeached the testimony by eliciting admission it was based solely on information from informants).

CONCLUSION

For all of the foregoing reasons, the State respectfully submits this Court should grant the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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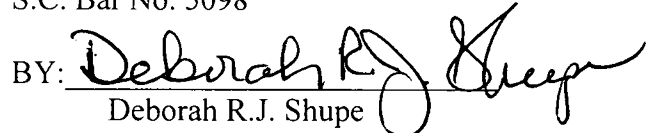

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The State, Petitioner,

v.

Raheem D. King, Respondent.

PROOF OF SERVICE

I, Sally B. Ellison, certify I served the within Petition For Writ of Certiorari to the Court of Appeals and Appendix by depositing copies in the United States mail, postage prepaid, addressed to:

Jenny L. Barwick, Esquire (1 copy)
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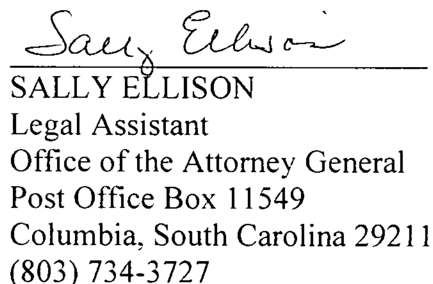
I further certify all parties required by Rule to be served have been served.

This 15th day of June, 2015.



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